

UPDATE

Recognition of and Assistance for Foreign Representatives in Insolvency Matters in the British Virgin Islands

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A recent decision of the Eastern Caribbean Court of Appeal has confirmed that, whilst the courts of the British Virgin Islands (BVI) will recognise the appointment of foreign representatives (including liquidators and trustees in bankruptcy) as having status in the BVI in accordance with his or her appointment by a foreign court, they may only provide assistance to representatives from certain designated countries. The scheme for recognition and assistance contained in the Insolvency Act, 2003 is a comprehensive code that does not leave room for extending assistance at common law to representatives from non-designated countries.

The Statutory Scheme

Parts XVIII and XIX of the Insolvency Act, 2003 (the **Act**) provide the statutory framework for the recognition and assistance of foreign representatives. Part XVIII contains a comprehensive scheme for recognising foreign representatives based upon the UNCITRAL Model Law on Cross-Border Insolvency. However, Part XVIII has not been brought into force and is still not an effective part of the Act.

Under Part XIX of the Act, a foreign representative appointed to act in a 'relevant' foreign country may apply to the courts of the BVI for an order in aid of the proceedings in which he or she is appointed. At present, the relevant designated countries include: Australia; Canada; Finland; Hong Kong; Japan; Jersey; New Zealand; the United Kingdom; and the United States of America.

Part XIX is designed to operate on an application-by-application basis. It gives a foreign representative from a relevant country express rights to apply to the courts of the BVI for orders in aid, but without conferring status on the foreign representative through the recognition of the foreign proceedings in which he or she has been appointed.

A Previous Attempt to Invoke Common Law Assistance

In *Re C (a bankrupt)* (31 July 2013), trustees in bankruptcy appointed by a Hong Kong court applied to the courts of the BVI for an order that they be granted all of the powers which they would have had if they had been appointed under the Act. The court in that case held that the trustees were entitled to specific orders in aid of the foreign proceedings in which they were appointed, Hong Kong being a relevant country for the purposes of Part XIX. However, the court expressed the *obiter* view that the common law approach to recognition and assistance did not survive in parallel with the statutory scheme. As such, it would not have been possible to confer upon the trustees the general powers that would be conferred upon a trustee appointed under the Act.

The Court of Appeal's View on Common Law Assistance

Net International Property Limited v Erez (22 February 2021) concerned an appeal against a decision of the BVI High Court recognising the appointment of a trustee in bankruptcy by an Israeli court and ordering, amongst other things, that the trustee be registered as the shareholder of the appellant BVI company. The Court of Appeal was required to consider whether the common law right of assistance survived the enactment of Part XIX of the Act, and if so, whether it was open to the courts of the BVI to grant the trustee

in bankruptcy assistance. Although not binding on the Court of Appeal, the trustee argued that the views regarding the existence of common law assistance expressed in *Re C* had been incorrect.

The Court of Appeal had no hesitation in finding that the common law right of recognition survived in the BVI notwithstanding the statutory scheme. However, the fact of recognition did not necessarily carry with it the right of assistance. As Israel was not a designated relevant country for the purposes of Part XIX of the Act, the trustee was not entitled to assistance under that Part.

As regards the possibility of providing assistance to the trustee at common law, the Court of Appeal held that *Re C* had been correctly decided and should be followed. It held that:

'... when the Legislature enacted Part XIX of the Act the intention was to provide a complete code for foreign representatives to apply to the BVI courts for assistance in cross-border insolvency matters such that foreign representatives from non-scheduled countries are unable to obtain assistance.'

In arriving at this conclusion, the Court of Appeal said that it did so with some regret because it did not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross-border insolvency cases.

Conclusion

As the Court of Appeal recognised, the BVI Legislature has made a deliberate decision to restrict the countries from which applications for assistance may be entertained, and it was not for the court to provide assistance by an alternative door using its inherent jurisdiction. Accordingly, unless and until Part XVIII of the Act is brought into force, it will not be possible for foreign representatives from countries other than those that have been designated for the purposes of Part XIX to obtain the active assistance of the courts in the BVI.

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